Filed 6/5/17 P. v. Savala CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DAVID HERNANDEZ SAVALA, Defendant and Appellant.	C074318 (Super. Ct. No. 12F07948) ORDER MODIFYING OPINION AND DENYING APPELLANT'S PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed May 10, 2017, in the above cause be modified as follows: In the third paragraph of part III of the opinion, delete the first two sentences:

As the People indicated in the proceedings below, the shoplifting offense applies only to theft of property not exceeding $950. The minute order does not show defendant presented any evidence as to the value of the property taken.

Replace those two sentences with the following:

The new shoplifting offense applies only to theft of property not exceeding $950 in value. During the trial court proceedings on defendant's Proposition 47 motion to

recall the sentence, the parties actually disputed whether the value of the stolen property was less than $950.

This modification does not change the judgment.

Appellant's petition for rehearing is denied.

/s/
RAYE, Acting P. J.

/s/
MURRAY, J.

/s/
HOCH, J.

Filed 5/10/17 P. v. Savala CA3 (unmodified version)

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DAVID HERNANDEZ SAVALA, Defendant and Appellant.	C074318 (Super. Ct. No. 12F07948)

A jury convicted defendant David Hernandez Savala of possession of stolen property (Pen. Code, § 496, subd. (a)) and second degree burglary (§ 459).[1] The trial court found defendant had a prior serious felony conviction (§ 667, subds. (b)-(i), 1170.12) and five prior convictions for which he had served prison terms without remaining free from custody for a period of five years (§ 667.5, subd. (b)). Along with various fines and fees, defendant was sentenced to serve 10 years in state prison.

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[1] Undesignated statutory references are to the Penal Code.

In his opening brief, defendant contends (1) the trial court erred in denying his motion to suppress evidence taken from his residence after the police conducted a warrantless search, (2) his motion to strike his prior serious felony conviction should have been granted in the interests of justice, and (3) his sentence for possession of stolen property should be stayed under section 654. In his reply brief, defendant abandons his contention that the sentence for possession of stolen property must be stayed.

While this appeal was pending, California voters enacted Proposition 47. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 [noting Proposition 47 became effective in November 2014].) This court stayed the appeal and granted a limited remand to the trial court to hear defendant's petition to recall his sentence. The trial court granted the petition as to the count of conviction for receipt of stolen property but denied it as to the second degree burglary. Defendant appealed this order and filed a supplemental brief in which he contends the trial court erred in denying his petition to redesignate his second degree burglary (§ 459) to the newly enacted misdemeanor of shoplifting (§ 459.5). In his supplemental briefing, defendant notes the reduction of his possession of stolen property conviction to a misdemeanor moots his original contention that the trial court erred in denying his prior motion to strike his prior serious felony conviction as to the violation of section 496, subdivision (a).

Regarding the original issues on appeal, we conclude the trial court properly denied defendant's motion to suppress because the warrantless entry was permissible on grounds his housemate was on searchable parole. Within the house, the police seized the stolen property evidence after defendant consented to a search of his room. We also conclude the trial court did not abuse its discretion in denying defendant's motion to strike his prior serious felony conviction based on his 20-year history of recidivism.

As to his challenge to the trial court's denial of his petition to recall the sentence and redesignate his second degree felony as misdemeanor shoplifting, we conclude

defendant did not meet his burden to show the stolen property did not exceed $950 in value.

Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Motion to Suppress

At the hearing on defendant's motion to suppress evidence, the prosecution introduced the testimony of Sacramento Police Officer Michael Severi. Officer Severi explained that on November 30, 2012, he was reviewing a photo from a police information bulletin regarding an auto theft and burglary at 24-Hour Fitness when he recognized defendant in it. Officer Severi had contacted defendant several times in the past and knew his extensive criminal background. At the time, defendant had recently been discharged from parole. A records check revealed defendant was living at 2311 John Still Drive -- an address at which another parolee, Freddy Tarin, also lived. Officer Severi stated, "It's a very violent residence where I know a homicide suspect was picked up at -- it's just -- there's a lot of basically crime that occurs at this residence."

Officers Severi, Trefhethen, and Fox went to the residence to conduct a parole search. Defendant's mother met the police officers at the door and confirmed Tarin lived there. The officers entered and moved all the occupants out of the bedrooms to conduct the search safely. Tarin and another man came out of their bedrooms. Defendant came out of his bedroom and joined the other occupants in the living room. The officers conducted a protective sweep of the house to ensure they could safely conduct the search. Defendant appeared nervous while sitting on the couch in the living room. According to Officer Severi, "he was tapping his feet on the ground and shaking his legs and kept asking me questions about why we were there." Inside defendant's bedroom, Officer Trefhethen saw but did not touch an iPhone. Officer Trefhethen went outside to contact the victim of the iPhone theft.

Officer Severi asked defendant if they could talk inside his bedroom. Defendant got up and walked into his bedroom. The officer asked permission to enter the bedroom and defendant consented. Inside the bedroom, defendant lay on his bed and looked more relaxed. Officer Severi noticed two cell phones on a nearby dresser. When asked about them, defendant said he was fixing the "non iphone." The iPhone belonged to his friend, Auggie. Officer Severi asked to pick up the iPhone, and defendant consented. Officer Trefhethen who was also in the room said he was going to call the number given to him by the victim. Officer Trefhethen dialed the number and the iPhone in Officer Severi's hand rang. The officers arrested defendant and read him his *Miranda* rights.[2]

The trial court denied the motion to suppress. In doing so, the trial court explained that "it certainly appears that the officer[']s subjective intent was to gather evidence against [defendant]. But our Supreme Court has been clear for at least the last decade that the subjective intent of the officer is not relevant." The trial court noted that "the defendant's presence and the officer[']s awareness of the defendant's potential involvement in that 24 Hour Fitness actually lends weight to the parole search of Tarin." Thus, the court concluded that "it does appear to be a reasonable search of the parolee." As to defendant's bedroom, the trial court stated that "it certainly is a massaging of the situation in order to put the officers in a position to look into [defendant's] bedroom and look for evidence that they believe is going to be there that's going to implicate him in that crime. [¶] But . . . the officer's subjective intent does not matter." The trial court found the officers engaged in a lawful protective sweep of the house and thereafter defendant gave valid consent to search his bedroom. Thus, the trial court decided that "this is a reasonable search of [defendant's] bedroom and seizure of the telephone . . . ."

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

Prosecution Evidence at Trial

On November 28, 2012, Anthony Windley was working the night shift at 24-Hour Fitness on Greenhaven Road in Sacramento. Two men -- one of whom was later identified as defendant -- walked into the gym at 5:50 a.m. and asked Windley about buying day passes. Windley was not able to sell a pass so early, and defendant responded by asking to use the bathroom. Although Windley was later reprimanded for doing so, he let the men into the gym.

As was his habit, Alex Deleon showed up around 6:00 a.m. for his workout. Deleon put his bag, which contained his car keys and wallet, into the locker and secured it with a lock. Two young men whom Deleon had not seen before lurked nearby. Defendant was one of them. Deleon saw defendant had a smirk and "just had a bad feeling after that." When Deleon returned to the locker, he found everything other than a towel had been taken. A quick search yielded Deleon's empty bag and bolt cutters next to a toilet. Deleon went to the front desk and called the police.

Deleon walked to a window to check on his car, which was still there. A few minutes later, someone asked Deleon whether it was his car being driven away. Deleon watched as his car was driven away. His iPhone was in the car.

Two days later, Officer Severi was reviewing a police information bulletin when he recognized defendant in the surveillance recording taken at the 24-Hour Fitness at the time of the burglary and theft of Deleon's car. Officers Severi, Trefhethen, and Fox went to defendant's listed residential address to follow up on his potential involvement in the burglary of the gym and theft of Deleon's iPhone. The officers went inside the house and had the occupants sit in the living room while they conducted a protective sweep. Defendant was very nervous and asked several times about why the police were there.

After the sweep, Officer Trefhethen went outside and called Deleon to get additional information. Deleon gave the phone number associated with his iPhone.

Officer Severi obtained defendant's consent to enter his bedroom. Inside the bedroom, Officer Severi found the iPhone and picked it up. A short time later, Officer Trefhethen joined them and dialed the number given by Deleon. The call connected to the iPhone in Officer Severi's hand. The iPhone also had the screen saver described by Deleon.

Defendant was advised of his *Miranda* rights. Upon being shown a photograph taken from the gym's surveillance camera, defendant admitted he had been at the gym two days earlier. Defendant retrieved the clothes he had been wearing when the surveillance footage was recorded. Even though Officer Severi did not mention automobile theft, defendant said he did not "get into that car." Defendant admitted he was in the locker room with his friend, but denied taking anything. Defendant did not leave with his friend "Flacco" -- going instead in another direction away from the gym.

Deleon's car was found at 2188 Montecito Way in Sacramento. The car had been stripped down to the frame.

Prior crimes evidence was introduced that showed in 2005, defendant was in possession of bolt cutters at the same time as he had stolen barbecue sets. In 2008, he was in possession of a stolen credit card.

Defense Evidence

Sacramento County Police Officer Gordon Burger testified he met with Deleon approximately an hour after the incident on November 28, 2012. Deleon told Officer Burger his locker was not locked.

Petition to Recall Defendant's Sentence

During the limited remand for consideration of defendant's motion to recall his sentence under Proposition 47, the trial court appointed trial counsel to represent him. The trial court granted the petition as to the conviction for receiving stolen property (§ 496, subd. (a)), but denied the petition as to the second degree burglary (§ 459). The trial court denied the petition as to the second degree burglary on grounds that "Count 2

stemmed from personal property (keys) taken from a personal locker at 24 Hour Fitness Gym per the Court's record. This is not a commercial establishment as contemplated under Prop 47 . . . ."

DISCUSSION

I

Motion to Suppress Evidence

Defendant contends the trial court erred in denying his motion to suppress evidence taken from his bedroom during the search of his residence. We reject the contention.

A.

Warrantless Searches of Parolee's Residences

Under the Fourth Amendment, "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." (U.S. Const., 4th Amend.) The California Supreme Court has explained that, " '[a]t the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable.' (*United States v. Karo* (1984) 468 U.S. 705, 714, 82 L.Ed.2d 530.) Indeed, 'the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." ' (*Payton v. New York* (1980) 445 U.S. 573, 585, 63 L.Ed.2d 639, quoting *United States v. United States District Court* (1972) 407 U.S. 297, 313, 32 L.Ed.2d 752.)" (*People v. Camacho* (2000) 23 Cal.4th 824, 831.)

As the California Supreme Court has explained, " '[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.' " (*People v. Sanders* (2003) 31 Cal.4th 318, 325, quoting *Griffin v. Wisconsin* (1987) 483 U.S. 868, 873 [97 L.Ed.2d 709].) Nonetheless, "[a] State's operation of a probation system, like its operation of a school, government office or

prison, or its supervision of a regulated industry, . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." (*Griffin v. Wisconsin*, at pp. 873–874.) Thus, the warrantless search of a probationer's residence pursuant to a search condition of probation may be conducted without any reasonable suspicion of criminal activity. (*People v. Bravo* (1987) 43 Cal.3d 600, 602, 607; *People v. Woods* (1999) 21 Cal.4th 668, 674–675 (*Woods*).) Therefore, a search pursuant to a probation search condition, conducted without reasonable suspicion of criminal activity, does not violate the Fourth Amendment so long as the search is not "undertaken for harassment or . . . for arbitrary or capricious reasons." (*Bravo, supra*, 43 Cal.3d at p. 610.) "But whether the purpose of the search is to monitor the probationer or to serve some other law enforcement purpose, or both, the search in any case remains limited in scope to the terms articulated in the search clause [citation] and to those areas of the residence over which the probationer is believed to exercise complete or joint authority [citations]." (*Woods, supra*, at p. 681.) "[I]f persons live with a probationer, common or shared areas of their residence may be searched by officers aware of an applicable search condition." (*People v. Robles* (2000) 23 Cal.4th 789, 798.) Such "a consent-based search is valid when consent is given by one person with common or superior authority over the area to be searched; the consent of other interested parties is unnecessary." (*Woods, supra*, 21 Cal.4th at p. 675; *People v. Baker* (2008) 164 Cal.App.4th 1152, 1158–1159.)

These principles for probation searches also apply to a search undertaken pursuant to a *parole* search condition. (*People v. Medina* (2007) 158 Cal.App.4th 1571, 1579-1580.) As the high court has held, "even in the absence of particularized suspicion, a search conducted under the auspices of a properly imposed parole search condition does not intrude on any expectation of privacy 'society is "prepared to recognize as legitimate." ' " (*People v. Reyes* (1998) 19 Cal.4th 743, 754 (*Reyes*), quoting *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 338, 105 S.Ct. 733, 83 L.Ed.2d 720.) Thus, the

lawfulness of a parole search condition does not depend on whether the police had reasonable suspicion in initiating the search. (*Reyes* at p. 754.) Moreover, the lawfulness of warrantless entry of a residence pursuant to a parole search condition generally does not turn on the officer's subjective intent. (*Woods, supra,* 21 Cal.4th at pp. 680–681.)

When entering a residence pursuant to a parole search condition, police officers may briefly detain persons present at the location of the search to determine what connection they have to the premises, to ensure officer safety, and to ensure the security of any contraband that may be present. (*People v. Glaser* (1995) 11 Cal.4th 354, 360–361, 365 (*Glaser*).) "As the United States Supreme Court observed in *Maryland v. Buie* (1990) 494 U.S. 325 [108 L.Ed.2d 276], involving the legality of a protective sweep during an in-home arrest, the dangers are particularly acute when an officer seeks to serve a warrant in a suspect's house. The officer is 'at the disadvantage of being on his [or her] adversary's "turf." An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.' (*Id*. at p. 333.)" (*Glaser, supra,* 11 Cal.4th at p. 368.)

Warrantless entry into a residence necessarily passes constitutional muster if the police officers enter pursuant to valid consent. As the United States Supreme Court has reasoned, it is "no doubt reasonable for the police to conduct a search once they have been permitted to do so." (*Florida v. Jimeno* (1991) 500 U.S. 248, 250-251 [114 L.Ed.2d 297].) Consent to search may be given by the individual whose property is searched or by a third party who has common authority over the area to be searched. (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 181 [111 L.Ed.2d 148].)

In reviewing a trial court's ruling on a motion to suppress evidence, "[w]e defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*Glaser, supra,* 11 Cal.4th at p. 362.) The appellant bears the burden of demonstrating

the trial court erred in ruling on the motion to suppress evidence. (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718.)

B.

Denial of Defendant's Motion to Suppress Evidence

The trial court properly denied defendant's motion to suppress the evidence found during the search of his residence on November 30, 2012. There is no dispute Tarin was on parole and subject to a search condition. As defendant acknowledges, the California Supreme Court has held there is no requirement of reasonable suspicion to conduct a warrantless search of a parolee. (*Reyes*, *supra*, 19 Cal.4th at p. 754.) Consequently, the police were not required to secure a warrant to enter the residence defendant shared with the parolee.

We reject defendant's contention the search was arbitrary, capricious, or intended to harass. Here, the police conducted the search of a residence where the police knew "there's a lot of basically crime that occurs at this residence." Moreover, the police were investigating a burglary that led them to the residence. The record is devoid of any evidence the search was conducted to harass any of the residents. Instead, defendant argues the search was arbitrary or capricious for lack of reasonable suspicion by the police. We reject the argument because, as we have already noted, reasonable suspicion is not required to execute a parole search condition. (*Reyes*, *supra*, 19 Cal.4th at p. 754.)

We also reject defendant's suggestion the pretext of a search based on Tarin's parole status but directed toward gathering evidence against defendant invalidates the search. It is well settled the subjective intent of the police generally does not dictate whether a warrantless residential search is lawful. (*Woods*, *supra*, 21 Cal.4th at pp. 680–681.) Even if the officers used the pretext of Tarin's searchable status, such subjective motivation does not render the search in this case unconstitutional. (*Ibid.*)

The police did not violate the Fourth Amendment by engaging in a protective sweep of the residence to gather all occupants into the living room. Officer Severi

testified this was "a very violent residence." In order to ensure the safety of the officers and the occupants, the police had the prerogative to engage in a protective sweep of the bedrooms. (*Glaser*, *supra*, 11 Cal.4th at pp. 365, 368.) Moreover, the evidence against defendant -- the stolen iPhone -- was not seized during the protective sweep. During the protective sweep, the stolen iPhone was seen by one of the officers. However, the police did not touch the iPhone until after they secured consent from defendant to enter his bedroom and to pick up the phone.

Defendant contends his "consent was not in any way attenuated from the illegal police conduct." The contention lacks merit. As we have explained, the police did not act unlawfully in entering the residence or conducting the protective sweep. Defendant does not suggest he was threatened by the police or the circumstances were so coercive as to overcome the voluntary nature of his consent. We conclude the evidence supports the trial court's finding defendant gave his voluntary consent to the search of his bedroom in which the police found the stolen iPhone.

In sum, the trial court did not err in denying defendant's motion to suppress evidence.

II

Sentencing

Defendant argues the trial court abused its discretion in denying his "*Romero* motion" to strike a prior serious felony conviction. This issue remains viable even after the trial court's ruling on the petition to recall the sentence because defendant's second degree burglary conviction remains intact. We reject defendant's argument.

A.

Defendant's Criminal History

At the sentencing hearing, defense counsel moved to strike defendant's prior serious felony conviction. The trial court denied the *Romero* motion and explained in pertinent part:

"As far as the immediate crime is concerned, it's apparent to me that . . . this was a planned crime, that there were at least two other people involved in the planning of this, one out in the car ready to take the two people who entered into -- I mean away from the gym after the theft; the other, apparently a younger co-perpetrator."

The trial court continued:

"Secondly, [defendant] involved someone who was apparently younger than him, which shows an amount of . . . if not actually being the leader, at least being the senior person who actually went into the [gym]. [¶] So although the crime itself seems like a stupid little thing, it does represent an amount of criminal sophistication and planning. [¶] As far as the prior strike is concerned, in that [section] 246 it appears [defendant] shot three times into another vehicle, and although nobody was hurt, and that resulted in a probation term, [defendant] then, for the next 20 years continued to collect convictions and commitments to prison which, as far as that prior crime is considered, it might otherwise be remote. It absolutely would otherwise be remote, going back to 1988. But in the interim, there is 20 years of consistent recidivism.

"As far as [defendant's] character, I note in the probation report that there were a number of representations [defendant] made to the probation department, including that his father passed away two years ago as a result of drinking issues; and then the probation officer went and pulled some other reports and said that in 1988, [defendant] stated his father had died in 1986."

The trial court further noted, "There's also indication that he told the probation officer he only used methamphetamine once or twice, while there is a Proposition 36 participation, that he was found in possession of oxycontin in 2008, and that he has a couple of convictions for possession of methamphetamine."

"But [defendant], while certainly is going to have value to his family, it cannot be argued that he is a good example to his family. Since he was 20 years old, he has consistently, predictably offended."

"And there's absolutely nothing that [defendant] has said, that [defendant's trial attorney] has artfully written and expressed to this Court, or even that I can think of that make me think that as soon as [defendant] gets out of custody, and perhaps off supervision, that he's not going to go out and re-offend again. [¶] This last time going into that gym, he had been past his discharge by about -- it wasn't even six weeks. And he couldn't keep it together for six weeks. [¶] So even if I assumed [defendant] has good intentions now, I don't have any confidence that he is going to be able to keep those promises that he makes to the court, or this community, even promises that he makes to his family, or to himself."

The trial court concluded, "So considering the current offense and the prior strike, and [defendant's] character and prospects, I'm going to decline to exercise my discretion to strike his prior."

The record shows defendant's criminal history includes convictions for:

1988: Inflicting corporal injury on a cohabitant (§ 273.5, subd. (a)) when he punched the victim in the mouth and threatened to kill her.

1988: Two counts of discharging a firearm at an occupied vehicle (§ 246) when defendant fired three shots at the victim's car.

1992: Robbery (§ 211) when defendant stole a vehicle.

1995: Driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)) and driving with a suspended license (Veh. Code, § 14601.1, subd. (a)).

1999: Possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and vehicle theft (Veh. Code, § 10851, subd. (a)) when defendant was found in possession of methamphetamine and a stolen vehicle during a traffic stop.

2001: Assault with great bodily injury (§ 243, subd. (d)) and assault with a deadly weapon (§ 245, subd. (a)(1)) when he joined three others in assaulting a rival gang member in jail.

2004: Petty theft (§ 484, subd. (a)), false impersonation of another (§ 529), and possession of a hypodermic needle without a permit (Bus. & Prof. Code, § 4140).

2005: Grand theft (§ 487, subd. (a)) and possession of stolen property (§ 496, subd. (a)) when defendant stole two barbecues from a supermarket.

2007: Possession of a dangerous substance (Health & Saf. Code, § 11377, subd. (a)) involving methamphetamine.

2008: Acquisition of access card information with intent to defraud (§ 484e, subd. (d)) and possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) when defendant was found to have the victim's identification and several gift cards. Defendant was also found with five oxycontin pills.

B.

The Trial Court's Exercise of Discretion

In deciding a *Romero* motion, the trial court "must consider whether, in light of the nature and circumstances of [defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of [defendant's] background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he [or she] had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

Defendant argues (1) his criminal record did not pose an insurmountable barrier to the granting of the *Romero* motion, (2) the non-violent nature of his current offense "can support the dismissal of the 'strike' priors," (3) his employment history and prospects "weigh significantly" in the determination of whether to grant the *Romero* motion, and (4) even without the enhancement due to his strike prior, he would have been eligible for a seven-year sentence. The argument misunderstands the nature of our review. We do not consider whether the trial court could have granted defendant's *Romero* motion. Instead, we determine whether the trial court abused its discretion by deciding in a

manner that exceeded the bounds of reason. As the California Supreme Court has held, the test for abuse of discretion in denying a *Romero* motion "asks in substance whether the ruling in question '*falls outside the bounds of reason*' under the applicable law and the relevant facts [citations]." (*People v. Garcia* (1999) 20 Cal.4th 490, 503, quoting *Williams, supra,* 17 Cal.4th at p. 162, italics added by the *Garcia* court.)

The record amply supports the trial court's conclusion that defendant's history displays a remarkable pattern of recidivism that, when combined with his dishonesty with the probation department and leadership role in committing the offenses in the current case, supports the denial of defendant's *Romero* motion. The record also shows the trial court reviewed defendant's family support network and prospects for continued employment. However, as the trial court noted, defendant decided to commit the current offenses shortly after his discharge from parole nonetheless. In short, the trial court properly considered defendant's circumstances when exercising its discretion on the *Romero* motion. In doing so, the trial court did not err.

III

Petition to Recall the Sentence

Defendant contends the trial court erred in denying his petition to recall the sentence as to his conviction of second degree burglary. He argues the gym in which he took the keys to the victim's vehicle was a commercial establishment for purposes of the new shoplifting misdemeanor (§ 459.5). We conclude defendant's recall petition was properly denied for another reason; defendant did not meet his burden to show the value of the property taken was less than $950.

"Section 1170.18 creates a process where persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47, may petition for resentencing. Section 1170.18, subdivision (b) provides in part: 'Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria for subdivision (a).' Under subdivision (b) a person who satisfies the

criteria in subdivision (a) of section 1170.18 shall have his or her sentence recalled and be sentenced to a misdemeanor (subject to certain exclusions not relevant here). If [the defendant] establishes the thefts in [applicable counts] were of a value of less than $950, he [or she] would be entitled to resentencing, absent any statutory exclusions." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879 (*Sherow*).) Under Proposition 47, "it is entirely appropriate to allocate the initial burden of proof to the petitioner to establish the facts upon which his or her eligibility is based." (*Id.* at p. 880; accord *People v. Johnson* (2016) 1 Cal.App.5th 953, 961 [collecting authority].)

As the People indicated in the proceedings below, the shoplifting offense applies only to theft of property not exceeding $950. The minute order does not show defendant presented any evidence as to the value of the property taken. In his supplemental brief, defendant focuses only on whether the gym is a commercial establishment and does not address the value of the property taken. Having failed to establish his entitlement to redesignation of his second degree burglary, the trial court properly denied his petition as to this count of conviction. Although the trial court based its denial on a different ground, "[n]o rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason." (*Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 39, quoting *Davey v. Southern Pacific Co*. (1897) 116 Cal. 325, 329.) Accordingly, we conclude the trial court did not err in denying the petition to redesignate the commercial burglary as misdemeanor shoplifting.[3]

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[3] Our conclusion obviates the need to address defendant's argument that the locker within the gym from which the property was stolen constituted a commercial establishment under section 459.5.

DISPOSITION

The judgment is affirmed. The stay issued by this court on January 7, 2016 is vacated.

/s/
HOCH, J.

We concur:

/s/
RAYE, P. J.

/s/
MURRAY, J.